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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 87-.....

SANGER-HARRIS, A Division of Federated Department Stores, Inc.,

Petitioner,

v.

ANN RICHARDS, Treasurer of the State of Texas,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a remand motion, which was not served upon the petitioner, and the related remand order issued in respect thereto, which contains the words "removed improperly and without jurisdiction," excluded from the Fifth Amendment due process guaranty of "receipt of notice and opportunity to be heard" pursuant to the provisions of 28 U.S.C. § 1447(d) and this court's decision in *Thermtron Products Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976)?

2. If the District Court is given timely notice that its remand order containing the clause "said cause was removed improperly and without jurisdiction" is based upon a remand motion that was not served upon the Petitioner, does the District Court have the power and obligation to correct its constitutionally defective remand order?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Jurisdiction	1
Constitutional and Other Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	9
Argument	12
Appendix	A-1 thru I-9

TABLE OF AUTHORITIES

PAGE

Armstrong v. *Manzo*, 380 U.S. 545 (1965) 15

Baldwin v. *Hale*, 68 U.S. 223 (1863) 14

Bucy v. *Nevada Construction Co.*, 125 F.2d 213 (9th Cir. 1942) 16, 17

Carson v. *Durham*, 121 U.S. 421 (1887) 13, 18

Expedition Unlimited Acquatic Enterprises, Inc. v. *Smithsonian Institute*, 500 F.2d 808 (5th Cir. 1974) . 18

Fuentes v. *Shevin*, 407 U.S. 67 (1972), reh'g denied, 409 U.S. 902 (1972) 10, 12, 14, 15

Hovey v. *Elliott*, 167 U.S. 409 (1897) 9, 16

In re La Providencia Development Corp., 406 F.2d 251 (1st Cir. 1969) 16, 17

In re Merrimack Mutual Fire Insurance Co., 587 F.2d 642 (5th Cir. 1978) 12

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1950) (Frankfurter, J., concurring) 10, 19

Klapprott v. *United States*, 335 U.S. 601 (1949) 18, 19

McVeigh v. *United States*, 78 U.S. (11 Wall) 259 (1870) 9

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 16

Shell Oil Co. v. *Texas*, 442 S.W.2d 47 (Tex.Civ.App.-Houston 1969, writ ref'd, n.r.e.) 10

Southern Pacific Transport Co. v. *Texas*, 380 S.W.2d 123 (Tex.Civ.App.-Houston 1964, writ ref'd) 10

Texas v. *New Jersey*, 397 U.S. 674 (1965) 5, 10

Thermtron Products, Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976) 1, 4, 9, 10, 11, 12, 13, 14, 15, 17, 19

Trent Realty Association v. *First Federal Savings Loan Association*, 657 F.2d 29 (3rd Cir. 1981) 12

United States v. *Rice*, 327 U.S. 742 (1946) 14

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U.S. 131 (1937) 18

PAGE

Wilson v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921) 12, 13, 19
Windsor v. *McVeigh*, 93 U.S. 277 (1876) 10, 16

CONSTITUTIONAL PROVISIONS

U.S. CONST. art.III, §§ 1,2 2
U.S. CONST. amend.V. 9, 11, 12, 13, 16, 17, 18

STATUTES

28 U.S.C. § 1254(1)(1948) 2
28 U.S.C. § 1291(1958) 2
28 U.S.C. § 1446(a), (b), (d), (e) (1965) 2, 9, 10, 15
28 U.S.C. § 1447(c), (d), (1964) .. 2, 9, 10, 12, 14, 15, 16, 17, 18
28 U.S.C. § 2201(1978) 2
FED. R. CIV. P. 1 ..... 2, 17, 18
FED. R. CIV. P. 5 ..... 2, 10, 15, 18
FED. R. CIV. P. 7 ..... 2, 10, 15
FED. R. CIV. P. 59 (a) & (d) 2, 17, 18
FED. R. CIV. P. 60(b)(1), 60(b)(3) and 60(b)(6) 2, 16, 17, 18
TEXAS PROP. CODE ANN., § 72, 74 (Vernon 1987). 5

MISCELLANEOUS

Sup.Ct.R. 20.4, 28 U.S.C. (1980) 2
1A. J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.157[13](2d. ed. 1987) ... 11
1A. J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.169[21] at 697, (2d. ed. 1983) 16-17
Federated Department Stores v. *Richards*, No. H-86-2759 (S.D. Tex. filed July 19, 1986) (dismissed)..... 6
Getty Oil Co. v. *Richards*, No. C-85-335 (S.D. Tex. Jan. 8, 1986)..... 5, 10
Richards v. *Sanger Harris*, No. 400,639 (Dist. Ct. of Travis County, 126th Judicial District of Texas, Oct. 3, 1986)..... 4

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the trial court's order remanding this case to the state court from which it was removed.

JURISDICTION

A per curiam opinion and related judgment were entered on March 11, 1987 by the United States Court of Appeals for the Fifth Circuit affirming the trial court's order remanding this case to the state court from which it was removed on the ground that this case was removed "improperly and without jurisdiction." A copy of the trial court order, the Fifth Circuit's per curiam opinion and judgment affirming such dismissal order and

order denying Suggestion for Rehearing En Banc by the Appellant are attached as Appendices A through D and appear at pages A-1 through D-2.

A timely Suggestion for Rehearing En Banc was filed on March 25, 1987 and was denied by the Fifth Circuit on April 30, 1987. The Petition for a Writ of Certiorari has been filed within the 60 day period after the denial on April 30, 1987 of the Suggestion for Rehearing En Banc.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1948).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves:

1) U.S. CONST. art. III, § § 1,2.
2) U.S. CONST. amend. V.
3) 28 U.S.C. § 1254(1)(1948).
4) 28 U.S.C. § 1291(1958).
5) 28 U.S.C. § 1446(a), (b), (d), (e) (1965).
6) 28 U.S.C. § 1447(c), (d), (1964).
7) 28 U.S.C. § 2201(1978).
8) Sup. Ct. R. 20.4, 28 U.S.C. (1980).
9) FED. R. CIV. P. 1
10) FED. R. CIV. P. 5.
11) FED. R. CIV. P. 7.
12) FED. R. CIV. P. 59(a) (d)
13) FED. R. CIV. P. 60(b)

The foregoing provisions are set forth verbatim in the Appendix. (Appendix I-1 through I-9)

STATEMENT OF THE CASE

Action by the trial court and the Fifth Circuit

On October 3, 1986, the United States District Court for the Western District of Texas — Austin Division, ("trial court"), acted upon the Respondent's remand motion containing a false/incorrect certification that a copy of the Respondent's September 12, 1986 remand motion[1] had been served upon the Petitioner. Jurisdiction vested in the trial court pursuant to 28 U.S.C. §§ 1331 and 1332 and removal of the case was approprate under 28 U.S.C. § 1441. The trial court entered its

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[1] The Respondent's "Motion to Remand and Memorandum in Support Thereof" filed on September 12, 1986 contained the following false and incorrect Certificate of Service:

"I hereby certify that a true and correct copy of the above and foregoing Motion to Remand and Memorandum in Support Thereof has been served on all parties to this docket on this the 12th day of September, 1986."

/s/ Jerry Benedict
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Attorney for Defendant

A similar false/incorrect certificate of service was attached to "Cross-Defendant's Motion to Dismiss Cross-Plaintiff's Countersuit pursuant to Rule 12 F.R.C.P." that had been filed by the Respondent on September 12, 1986. The Petitioner did not learn of the existence of the dismissal motion until the preparation of its Appellant's Brief for submission to the Fifth Circuit.

An incomplete certificate of service that omitted the Petitioner's counsel's name and address was attached to the "Appellee's Response to Appellant's Suggestion for Rehearing En Banc" that was filed by the Respondent on April 20, 1987. During the course of a proceeding in a state court a comment was made to the Respondent's counsel about the Petitioner's failure to receive a copy of the Response. An investigation was made by the Respondent's counsel and a copy of the Response was mailed by Respondent's counsel to the Petitioner's counsel on April 28, 1987.

October 3, 1986 order remanding the declaratory judgment action[2] filed by the Respondent and the Petitioner/Cross-Plaintiff's Original Counterclaim to the Travis County, Texas, District Court from which it had been removed[3] on the grounds that the "cause had been removed improperly and without jurisdiction."

After the trial court's denial of the Petitioner's Motion for a New Trial and the denial of the Joint Motion for Relief filed by the Petitioner and the Respondent, the Petitioner filed and perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit in respect to the trial court's remand order. The Fifth Circuit in a per curiam opinion affirmed the trial court's remand order on the ground that under the rule of *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976) the Fifth Circuit was precluded from reviewing the trial court's remand order under any circumstances and stated (Appendix B):

> This appeal seeks review by us of an order of the trial court remanding this case to state court on the ground that it was removed "improvidently and without jurisdiction," . . .—orders which recite the magic words that we quote above—are "not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." (citation omitted.)
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> * * *
>
> The *Thermtron* court does not say that we cannot review orders purporting to remand on this basis on certain

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[2] *Richards* v. *Sanger Harris*,, No. 400,639, (Dist. Ct. of Travis County, 126th Judicial District of Texas, Oct. 3, 1986), a declaratory judgment action by the State Treasurer seeking the right to examine for an indefinite number of years the records of the Sanger Harris Division in respect to its compliance with the escheat/abandoned property law of the State of Texas.

[3] *Richards* v. *Sanger Harris*, No. 400,639 (Dist. Ct. of Travis County, 126th Judicial District of Texas, Oct. 3, 1986). The declaratory judgment action by the State Treasurer was removed to the United States District Court for the Western District of Texas, Austin Division, in the proceeding Civil Action No. A-86-CA-454.

grounds, or for certain faults; for constitutional infirmitites, but not for statutory ones: it says that we cannot review them *at all*. There it ends.

Chronology of events

For the years covered by the declaratory judgment action the Petitioner timely filed reports describing property subject to escheat under the TEXAS PROP. CODE ANN., Title 6. Escheat, (Vernon 1987)("Escheat Act") and describing property for which the Petitioner had no reporting obligation for the reason that title to such property had vested in the Petitioner under applicable Texas statutes of limitation.

In order to resolve a controversy involving the possible escheat of unclaimed mineral proceeds in the fall of 1985, Getty Oil Co. and thirty other oil companies commenced a declaratory judgment[4] action ("Getty case") to have the Texas Escheat Act declared unconstitutional on numerous grounds. The case was compromised and settled[5] on the eve of trial on January 8, 1986.

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[4] *Getty Oil Co.* v. *Richards*, No. C-85-335, (S.D. Tex. Jan. 8, 1986). Included among the 31 plaintiffs were Getty Oil Company, Atlantic Richfield, Inc., Conoco, Inc., Texaco, Inc., Mobil Oil Corporation, Union Oil Company, Phillips Petroleum Co. and Exxon Company U.S.A. The 31 oil companies claimed that the Escheat Act violated the plaintiff's due process rights, was void under the Supremacy Clause and this court's decision in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), denied the plaintiffs equal protection under the laws, deprived the plaintiff's of their vested rights under Texas' statutes of limitation and constituted a retroactive law that was void under the Texas Constitution.

[5] The settlement agreed to by the State Treasurer and the Attorney-General of the State of Texas was predicated upon Texas' express recognition of the principles of *Texas* v. *New Jersey*, 397 U.S. 674 (1965), an agreement that the oil companies would immediately commence remitting unclaimed mineral proceeds and that 29 of the oil companies would not report and remit debts which accrued prior to 9/1/80 and 2 of the oil companies (Mobil and Union) would remit mineral proceed debts which accrued prior to 9/1/79 and 9/1/78, respectively, and that the state would not audit the oil companies for the handling of unclaimed mineral proceed debts accrued prior to 9/1/80.

On April 28, 1986 the representatives of the Respondent notified the Petitioner, a Delaware corporation, that commencing on May 27, 1986 they would examine the books of the Petitioner's Sanger Harris Division ("Sanger") to ascertain the Petitioner's compliance with Texas laws pertaining to the escheat of and the abandonment of personal property. On May 26, 1986 the scope of the Respondent's examination was modified and enlarged. In view of the January 8, 1986 settlement agreed to by the Respondent in the *Getty* case, the Petitioner advised the Respondent that it would allow an examination of its books and records for the period after September 1, 1981, but that it would not allow its books to be examined for the period prior to September 1, 1981, the first date on which Texas' new statutory four year dormancy period for presumptively abandoned property would be effective.

On July 15, 1986 the Respondent filed its declaratory judgment action seeking a declaration of its rights to examine Sanger's books and records to ascertain if the Petitioner had reported and remitted to the State of Texas each and every item of unclaimed property after it had been on the Petitioner's books for a period of years, i.e. at least back to 1961.

On August 21, 1986[6] the Petitioner filed in this case its Petition for Removal of Civil Action to the United States District

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[6] On July 19, 1986 the Petitioner had filed a complaint in the United States District Court for the Southern District of Texas-Houston Division styled, *"Federated Dept. Stores* v. *Richards*, No. H-86-2759 (S.D. Tex. filed July 19, 1986) (dismissed), (Houston case), seeking a declaratory judgment in respect to the State Treasurer and the Attorney General of the State of Texas in respect to Texas' escheat act and a temporary restraining order or preliminary injunction seeking to prevent the Respondent from enforcing or attempting to enforce Texas' escheat laws on the same grounds set forth in Petitioner's Original Counterclaim in the case removed to the trial court in this case.

On July 28, 1986, the Respondent filed in the *Houston* case Defendant's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(6) and Response to Plaintiff's Application for Temporary

Court for the Western District of Texas-Austin Division, where this case was assigned Cause No. A-86-CA-454. On the same date the Petitioner filed its Answer to the Plaintiff's Original Petition and Cross Plaintiff's Original Counterclaim, in which counterclaim the Petitioner challenged the constitutionality of the Texas Escheat Act as violating the contract, supremacy, just compensation and due process clauses of the Constitution of the United States, as subjecting the Petitioner to multiple liability to different states for the same intangible property, as requiring the reporting and delivery to Texas of property with respect to which the indemnification provisions of the unclaimed property laws are inadequate to protect the Petitioner from multiple liability, and by denying the Petitioner equal protection of the law.

Contemporaneously with the filing of the Respondent's remand motion on September 11, 1986 the Respondent filed a motion to dismiss the Petitioner's original counterclaim, which motion contained a false/incorrect certification that the Respondent had served a copy of the dismissal motion upon the Petitioner. The Petitioner learned of the existence of the dismissal motion during the preparation of its Appellant's Brief for submission to the Fifth Circuit.

On October 3, 1986 the trial court entered its order remanding the declaratory judgment action to the state court from which it was removed. The remand order was received in the office of the Petitioner's counsel on October 6, 1986 at which time telephone inquiries were made about the entry of the

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Restraining Order ("Dismissal Motion"). On July 28, 1986 the Court in the *Houston* case orally denied Petitioner's Request for a temporary restraining order or preliminary injunction. On August 7, 1986 the Court issued its written order denying the request for a temporary restraining order and instructed the Petitioner to respond to the Dismissal Motion within twenty (20) days, which response was timely filed by the Petitioner. On March 25, 1987 the court dismissed the complaint on the grounds of abstention and that there were numerous issues that the courts of Texas should decide rather than a federal court.

remand order to the Respondent's counsel, the Clerk's office for the Austin Division of the United States District Court, and the law clerk for United States District Court Judge Nowlin, who signed the order. The views developed during the foregoing telephone discussions led to the filing of a Motion for New Trial and a Joint Motion for Relief from Order.

On October 14, 1986 the Petitioner filed in this case its Motion for New Trial (Appendix E) on the grounds that the Petitioner had not received a copy of the remand motion either by certified mail, regular mail or by any other manner of delivery, that conferences with attorneys for the Respondent revealed that the records of the Respondent's attorneys did not show that the remand motion was in any manner served upon counsel for Petitioner and that the Respondent's failure to serve a copy of the remand motion upon the Petitioner denied the Petitioner due process and the opportunity to present to the trial court its defenses on the merits. On October 22, 1986 the trial court entered its Order stating that Petitioner's motion for New Trial was not meritorious, should be denied and that the court no longer had jurisdiction in this cause. (Appendix F)

On October 27, 1986 the Petitioner and the Respondent filed a Joint Motion for Relief from Order (Appendix G) pursuant to FED. R. CIV. P. 60(b)(1) on the grounds that as a result of mistake or inadvertence, the Petitioner had not been served with a copy of the remand motion that had been filed, so that the Petitioner was not extended the opportunity to file a responsive pleading on the merits in respect to the remand motion and consequently the Petitioner was denied its rights to due process and its right to be heard in the trial court. On December 8, 1986 the trial court entered its Order denying the Joint Motion for Relief from Order on the grounds that it was not meritorious, for the reason that in the order of remand the trial court had stated that the remand was based "upon the ground that said cause was removed improperly and without jurisdiction. Consequently, the

Court is of the opinion that it has no jurisdiction to entertain this Motion." (Appendix H)

A timely notice of appeal was filed by the Petitioner and updated supplemental Notices of Appeal were filed in respect to the trial court's orders dated October 3, 1986, October 22, 1986 and December 8, 1986 denying the Petitioner relief from the remand order.

REASONS FOR GRANTING THE WRIT

A writ should be granted to cure a direct violation of the Petitioner's due process right to notice and right to an opportunity to be heard. The Fifth Amendment due process guaranty of the "right to receive notice and to have an opportunity to be heard" is not a tentative or discretionary guaranty and should not be accorded such treatment. From the time of this Court's earliest due process decisions, the right to a hearing has been regarded as a fundamental aspect of "the first principles of the social compact and of the right administration of justice." *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259, 267 (1870). The right to be heard is a fundamental and elementary principle of the judicial function of the United States and such principle has its roots in both Roman law and the common law. *Hovey* v. *Elliott*, 167 U.S. 409, 415-418 (1897).

The trial court's orders and the Fifth Circuit's judgment in this case rest upon the mistaken premise that by a long series of decisions culminating in this Court's *Thermtron* decision, a defendant's Fifth Amendment due process guaranty of receipt of notice and an opportunity to be heard is inapplicable to removal cases arising under 28 U.S.C. § 1446 (1964) and 28 U.S.C. § 1447 (1965). The trial court orders reflect the trial court's incorrect conclusion that it lacked jurisdiction to correct its invalid order. The Fifth Circuit judgment reflects the position that regardless of the existence of the constitutional guaranty of due process, the Fifth Circuit, as an appellate court, is barred by

this Court's *Thermtron* decision from seeing that the Petitioner enjoys its right to due process.

The Petitioner complied with the provisions of 28 U.S.C. § 1446. The Respondent did not comply with 28 U.S.C. § 1447 for the reason that she ineffectually complied with FED. R. CIV. P. 5 and 7. The Respondent's failure to comply with FED. R. CIV. P. 5 and 7 prevented the Respondent's effective invocation of § 1447(c). The trial court's issuance of its remand order, after receipt of the Respondent's remand motion that contained a false/incorrect certification that the remand motion had been served upon the Petitioner, violated the Petitioner's procedural due process rights and should be reversed. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), reh'g denied, 409 U.S. 902 (1972). Since notice was not given to the Petitioner of the filing of the remand motion, the trial court had no jurisdiction to issue its remand order. *Windsor* v. *McVeigh*, 93 U.S. 277, 278 (1876); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170172 (1950) (Frankfurter, J., concurring). The remand order was void *ab initio* because of the failure to comply with the procedural due process "notice of hearing" guaranty of the Fifth Amendment to the Constitution of the United States.

The Petitioner made a value judgment in this case that the issues presented by the Respondent's declaratory judgment action would be best resolved in federal court in light of the settlement in the *Getty* case and the uncertainty about Texas' planned Escheat Act enforcement activities.[7] The right to

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[7] The State Treasurer had declared her intention to have a vigorous enforcement of the Escheat Act which had not been amended to correct the deficiencies in the Act, that were revealed by the decision in *Texas* v. *New Jersey*, 379 U.S. 674 (1965). At the same time, the State Treasurer had also indicated her intention to challenge the correctness/applicability of the decisions in *Shell Oil Co.* v. *Texas*, 442 S.W.2d 47 (Tex.Civ.App. — Houston 1969, writ ref'd, n.r.e.) and *Southern Pacific Transport Co.* v. *Texas*, 380 S.W.2d 123 (Tex.Civ.App. — Houston 1964, writ ref'd), which decisions prevented the State of Texas from claiming derivative

remove a case to federal court is a statutory right which cannot be disregarded if the statutory prerequisites for removal are met. *Thermtron*, 423 U.S. at 344. The decision to remove a case to federal court is mainly a reflection of the defendant's counsel's concern over "the practicalities involved in litigating his particular cases." 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.157[13] (2d ed 1983).

The failure to give notice of the filing of motions and other documents will occur under a variety of circumstances.[8] It is not possible to state with certainty whether the exclusion of remand orders from the receipt of notice and opportunity to be heard protection of the due process guaranty of the Fifth Amendment will result in the future in one or more situations where notice of the filing of a remand motion or other orders will be withheld intentionally or unintentionally from the opposing party. The self-serving benefits attributable to the failure to give notice are predictable, and are illustrated by the instant case, where notice of the filing of the remand order was not given to the Petitioner and the Respondent was unwilling to dismiss its declaratory judgment action and forego the strategic procedural gain that occurred when the trial court accepted and acted upon the Respondent's false/incorrect certification that the Petitioner had been notified of the filing of the remand motion.

It can be expected that advocates confronted with other types of due process problems may seek to capitalize on instances of intentional or unintentional conduct with the hope of creating additional situations where the applicability or inapplicability of the due process guaranty may produce the same type of or a similiar advantage as that received by the Respondent in this case, for example, fraud in the designation of parties in order to

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escheat rights to property that the original owner/claimants of the property were barred from receiving under applicable Texas statutes of limitation.

[8] See footnote 1, *supra*.

demonstrate or refute diversity of citizenship or the concealment of the existence of a federal question. *Wilson* v. *Republic Iron Steel Co.*, 257 U.S. 92, 97 (1921).

ARGUMENT

I.

28 U.S.C. 1447(d) and the decision in *Thermtron* are extreme statements of legislative and judicial policy about the remand process that are subject to and circumscribed by the procedural due process notice and hearing guaranty of the Fifth Amendment to the Constitution of the United States.

Due process rights, § 1447(c) determinations, § 1447(d) limitations, and *Thermtron* principles are consistent

The remand order in this case was not issued *sua sponte* as a result of the trial court's independent review of and concern about the petition for removal. *Trent Realty Association* v. *First Federal Savings Loan Association*, 657 F.2d 29, 31, 36 (3rd Cir. 1981). The remand order was not a *Thermtron*-type order issued by the trial court on its own initiative and after notice to and a hearing for and with the parties, at which hearing the court determined that the congestion of its trial docket made it appropriate to remand the case to the state court where a prompt trial could be held. *Thermtron*, 423 U.S. at 339, 340. The trial court's order was formulated in circumstances where § 1447(c) was not operative.

The remand order fell within the procedural due process protection of the Fifth Amendment. *Fuentes*, 407 U.S. at 80. The remand order contains the holding by the trial court that the case was "remanded improperly and without jurisdiction" which brings it within the apparent and extreme prohibitory ambit of *Thermtron*. *See also, In re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642, 647 (5th Cir. 1978). This court is the final arbiter of the dichotomy, if any there be, that results from the

interplay of the Fifth Amendment and this Court's decision in *Thermtron*.

A dichotomy does not exist between the constitutional guaranty of appropriate due process notice and the decision in the *Thermtron* case. Rather the problem that exists is one that is attributable to the failure of the trial and appellate courts to recognize and adhere to the bellwether principle of this Court to recognize, respect and enforce the constitutional guaranty of due process.

The removal of the instant case having been accomplished, the issues raised by the Respondent's remand motion should have been "heard and determined by the district court." *Wilson*, 257 U.S at 97. Just as the right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy, the removal in this case should not be defeated by the processing of a defective remand motion and the issuance of a constitutionally defective remand order. *Id.* at 97. A challenge to the correctness of the removal having been made by the Respondent, the burden of proving the correctness of the removal rested upon the Petitioner. *Carson* v. *Durham* 121 U.S. 421 (1887). The Petitioner was prepared to discharge that burden of proof but was prevented from doing so by the Respondent's false/incorrect certification of service. The inclusion of a false/incorrect certification in the remand motion that notice of the filing of the remand motion was served upon the Petitioner should not be the vehicle to defeat the Petitioner's right to procedural due process in making an effective defense of the removal action.

Thermtron did not expressly resolve due process issues involved in remand cases

This case presents the simple question of whether a constitutionally deficient remand order is immune from appellate review. A literal and incorrect reading of some cases indicates the possibility that remand orders might fall outside the protection of the

due process guaranty. ". . . in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c) . . ." *Thermtron*, 423 U.S. at 351; *United States* v. *Rice*, 327 U.S. 742 (1946).

28 U.S.C. § 1447(d) exists within the legal framework of our constitutional due process guaranties. § 1447(d) is not an absolute rule of law that is immune from judicial scrutiny. *Thermtron*, 423 U.S. at 352. Justice White recognized the Court's duty to prevent the development of a judicial gloss or overlay on § 1447(d) that would defeat the Congressional intent to prevent protracted litigation in remand cases. At the same time it was pointed out that the Court has not construed the present or past prohibition against review of remand orders so as to extinguish "the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal." *Id.* at 351, 352. Neither the majority opinion in *Thermtron* nor Chief Justice Rehnquist's dissent dealt with the question of whether § 1447(d) immunized against appellate review a remand order that violated the Petitioner's procedural due process guaranty of receipt of notice and an opportunity to be heard in respect to the Respondent's remand motion.

Procedural due process cannot be defeated by statute or case law

The central meaning of procedural due process is: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 68 U.S. 223 (1863); *Fuentes*, 407 U.S. at 80. It is fundamental to due process that the right to notice and an opportunity to be heard "must be granted at a meaningful time

and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Fuentes*, 407 U.S. at 80.

The instant case was properly removed to the United States District Court of the Western District of Texas in accordance with the provisions of 28 U.S.C. § 1446(d), (e). Remand motions, which do not comply with the service requirements of FED. R. CIV. P. 5, are not the subject of a specific exception to or exemption under 28 U.S.C. § 1447(c) or (d).

The Petitioner complied with the provisions of 28 U.S.C. § 1446. The Respondent sought to invoke 28 U.S.C. § 1447 and made an ineffectual compliance with FED. R. CIV. P. 5 and 7. The Respondent's failure to comply with FED. R. CIV. P. 5 and 7 prevented the effective invocation of § 1447(c) with the consequence that the Court's remand order violated the Petitioner's procedural due process right to receive notice and be given an opportunity to be heard.

An invalid remand motion cannot form the basis for a valid remand order

FED. R. CIV. P. 7(b)(1) imposes as a condition precedent to the invocation of 1447(d), the filing of a written motion that complies with FED. R. CIV. P. 5. Rule 5 imposes an absolute obligation upon a party filing a written motion to serve a copy of such motion upon the opposing party or his attorney. The Respondent failed to comply with Rule 5 and, therefore, ineffectually sought to invoke § 1447(d).

The trial court's October 3, 1986 remand order, which states "Before the Court is Plaintiff Ann W. Richards, Treasurer of the State of Texas, Motion to Remand" was ineffective to bring the remand order within the ambit of § 1447(d) and the rule of the *Thermtron*. The remand order was not a *sua sponte* determination by the trial court on its own initiative that the case was "removed improvidently and without jurisdiction", but instead

was a direct result of the trial court's consideration of the Respondent's remand motion.

This Court should determine that the Fifth Amendment due process guaranty preempts and takes precedence over § 1447(d) and the legislative/judicial policy expressed in respect to such section.

II

When notified in a timely fashion that the Petitioner had not received notice of the filing of the remand motion, the trial court, whose processes were invoked by the Respondent's remand motion, had the power and affirmative obligation to withdraw the remand order and grant a hearing to the Petitioner in respect to the issues raised in the remand motion pursuant to the procedural due process guaranty of the Fifth Amendment to the United States Constitution, the court's inherent power over and control of its own processes and the authority granted the trial court under FED. R. CIV. P. 60(b).

The trial court's remand order was constitutionally defective. It was an order which the court did not have jurisdiction to enter, for it was entered without notice and without an opportunity for the Petitioner to be heard in respect to the matters covered by the order. *Windsor,* 93 U.S. at 277, 278; *Hovey,* 167 U.S. at 415. There is no issue as to the adequacy of notice in respect to the motion or order, for the reason that the Petitioner received no notice of the remand motion and was not given an opportunity to be heard in respect to the remand motion before it was acted upon by the trial court. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

The entry of and delivery to a state court of a constitutionally proper order forecloses the trial court from revoking its remand order. *In re La Providencia Development Corp.,* 406 F.2d 251, 252-253 (1st Cir. 1969); *Bucy* v. *Nevada Construction Co.,* 125 F.2d 213 (9th Cir. 1942); 1A J. MOORE & B. RINGLE,

MOORE'S FEDERAL PRACTICE, ¶0.169[2-1] at 697 (2d ed. 1983).

Since the trial court's remand order was constitutionally defective, it was not a valid order under 28 U.S.C. 1447(c) and falls outside the reach of the decisions in *La Providencia* and *Bucy*. The issue then becomes "Is there something about a remand order that places it outside the reach of the due process protection of the Fifth Amendment and the supervisory authority of this court?" This court has answered "No." *Thermtron*, 423 U.S. at 352.

In the light of the facts in this case, the constitutional guaranty of due process, the trial court's inherent control over its own processes, the just mandate of FED. R. CIV. P. 1, the trial court's right to grant a new trial under FED. R. CIV. P. 59(a) and (d) and the trial court's right to grant relief from the remand order on the grounds set forth in FED. R. CIV. P. 60(b), the trial court had both the power and obligation to withdraw the remand order and grant the Petitioner a hearing in respect to the matters raised in the remand motion.

The Petitioner in a timely fashion had:

a) notified the Respondent's counsel, the U.S. District Clerk's office and the office of the trial judge that a remand order had been entered without notice to the Petitioner; and

b) Sought relief from the remand order by the timely filing of a Motion for New Trial, under FED. R. CIV. P. 59(a) and a Joint Motion for Relief from Order under FED. R. CIV. P. 60(b).

c) Appealed to the Fifth Circuit to correct the trial court's errors.

The trial court had the power to withdraw its remand order and set the remand motion for hearing after being timely notified by its law clerk of the absence of service of notice upon the Petitioner, by the Petitioner through its Motion for New Trial and by the Petitioner and Respondent, through their Joint

Motion for Relief from Order. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137 (1937). The Petitioner's Motion for New Trial alerted the trial court to the injustice of the entry of a remand order under circumstances where the Petitioner had no knowledge as to the course of action the trial court was being requested to take. The Joint Motion for Relief from Order filed by the Petitioner and Respondent constituted a judicial admission by the Petitioner and Respondent that the remand motion failed to comply with the service requirements of FED. R. CIV. P. 5 and that the remand order issued in respect to the remand motion was constitutionally defective. The just requirement of FED. R. CIV. P. 1 clearly supports the proposition that FED. R. CIV. P. 59(a) and 60(b) should be construed in a way to accomplish justice by giving the Petitioner the opportunity to prove the correctness of the removal. *Carson*, 121 U.S. at 426; *Klapprott* v. *United States*, 335 U.S. 601, 615 (1949); *Expedition Unlimited Acquatic Enterprises Inc.* v. *Smithsonian Institute*, 500 F.2d 808, 809 (5th Cir. 1974).

The Petitioner took reasonable action to notify the trial court of its error in order to obtain an appropriate correction of the remand order. The trial court mistakenly determined that it lacked authority to correct its error. The problem is analagous to one involving default judgments. The statutes and rules have largely left for judicial determination the type of cases in which hearings and proof should precede default judgments and accordingly it is the final responsibility of this Court to formulate the controlling rules for hearings and proof in respect to default judgments. *Klapprott*, 335 U.S. at 611. The Fifth Amendment mandates that all orders be issued in compliance with due process of law. §§ 1447(c) and (d) are silent in respect to the consequences of issuing a remand order when there has not been compliance with due process of law in respect to the remand motion which precipitated the issuance of the remand order. This Court's decision in *Klapprott* presupposes authority

in both the trial court and the Fifth Circuit to remedy the violation of the Petitioner's due process right to receive notice and be given an opportunity to be heard. In the absence of remedial action by the trial court or the Fifth Circuit, the decision in *Klapprott* places the responsibility for corrective clarifying action upon this Court. *Id* at 611.

CONCLUSION

Due process of law has many meanings depending upon factual conditions and the circumstances under which the concept becomes relevant. *McGrath*, 341 U.S. at 162-164. In a non-emergency, non-national security context such as the one involved in this case where the issue was whether the case should be remanded to the trial court from which it was removed, there is no doubt that the failure to give notice of the filing of the remand motion gave rise to a constitutionally defective remand order which cannot be allowed to remain in place for it jeopardized the Petitioner's property interests. The Court should exercise its supervisory authority and require the trial court to conduct a hearing in respect to the Remand Motion. *Thermtron*, 423 U.S. at 352, *Klapprott*, 335 U.S. at 611; *Wilson*, 257 U.S. at 97.

DATED June 3, 1987

Respectfully submitted,

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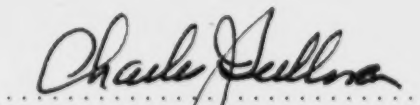
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that service of the Petition for a Writ of Certiorari has been made on opposing counsel by mailing a copy, certified mail, return receipt requested, to Mr. Jerry L. Benedict and to Mr. Patrick J. Wiseman, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548 this 3rd day of June, 1987.



CHARLES J. SULLIVAN

APPENDIX

APPENDIX A

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANN RICHARDS,
Treasurer of the
State of Texas
vs.
SANGER-HARRIS,
A Division of
Federated Department
Stores, Inc.

CIVIL
NO. A-86-CA-454

ORDER

Before the Court is Plaintiff Ann W. Richards', Treasurer of the State of Texas, Motion to Remand. The Court has duly considered the Motion and is of the opinion that it is meritorious and should be Granted.

IT IS HEREBY ORDERED that the case of Ann W. Richards, Treasurer of the State of Texas v. Sanger-Harris, a Division of Federated Department Stores, Inc. be REMANDED to the 167th District Court of Travis County, Texas, from which it was removed, upon the ground that said cause was removed improperly and without jurisdiction.

IT IS FURTHER ORDERED that the Clerk of this Court furnish the Clerk of said state court with an attested or certified copy of this order.

SIGNED and ENTERED this 3rd day of October, 1986.

s/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX B

ANN RICHARDS, Treasurer of the State of Texas,

Plaintiff-Cross Defendant-Appellee,

vs.

FEDERATED DEPARTMENT STORES, INC.,

Defendant,

SANGER-HARRIS, A Division of Federated Department Stores, Inc.,

Defendant-Cross Plantiff-Appellant.

No. 86-1797 Summary Calendar.

United States Court of Appeals, Fifth Circuit.

March 11, 1987.

The United States District Court, Western District of Texas, James R. Nowlin, J., ordered action remanded to state court on ground that action was removed "improvidently and without jurisdiction." Defendant appealed. The Court of Appeals held that order was not subject to challenge by appeal, by mandamus, or otherwise.

Removal of Cases West Key Digest 107(9)

Order to remand action to state court on ground that action was removed "improvidently and without jurisdiction" was not subject to challenge in the Court of Appeals by appeal, by mandamus, or otherwise, even if order merely "purported" to remand on stated grounds.

Appeals from the United States District Court for the Western District of Texas.

Before GEE, RUBIN, and JOLLY, Circuit Judges.

PER CURIAM:

The appeal seeks review by us of an order of the trial court remanding this case to state court on the ground that it was removed "improvidently and without jurisdiction," essentially on the ground that appellant did not recieve notice of the motion to remand and had no opportunity to oppose it. Assuming that this is true (as it appears to be), it remains that such orders as that of the trial court — orders which recite the magic words that we quote above — are "not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed.2d (1976).[1]

The *Thermtron* court does not say that we cannot review orders purporting to remand on this basis on certain grounds, or for certain faults; for constitutional infirmities, but not for statutory ones: it says that we cannot review them *at all*. There it ends.

AFFIRMED.

---

[1] The Court's opinion, at the page cited, makes plain that the words are indeed magic ones: the order is proof against review event if it merely "purports" to remand on the ground quoted.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1797

D.C. Docket No. A-86-CA-454

ANN RICHARDS, Treasurer of the State of Texas
Plaintiff-Cross Defendant-Appellee,

VS.

FEDERATED DEPARTMENT STORES, INC.,
Defendant,

SANGER-HARRIS, A Division of Federated Department Stores, Inc.,
Defendant-Cross Plaintiff-Appellant.

Appeals from the United States District Court for the Western District of Texas.

Before GEE, RUBIN and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjusted by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-cross-plaintiff-appellant to pay plaintiff-cross defendant-appellee the costs on appeal, to be taxed by the Clerk on this Court.

March 11, 1987

ISSUED AS MANDATE:

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1797

ANN RICHARDS, Treasurer of the State of Texas,
Plaintiff-Cross Defendant-Appellee,
vs.
FEDERATED DEPARTMENT STORES, INC.,
Defendant,
SANGER-HARRIS, A Division of Federated Department Stores, Inc.,
Defendant-Cross Plaintiff-Appellant.

Appeals from the United States District Court for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion MARCH 11, 5 Cir., 1987, ...F.2d .....)

(April 30, 1987)

Before GEE, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a

majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ THOMAS GIBBS GEE
United States Circuit Judge

APPENDIX E

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

ANN RICHARDS, Treasurer of the State of Texas vs. SANGER-HARRIS, A Division of Federated Department Stores, Inc.	CIVIL ACTION No. A-86-CA-454

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Federated Department Stores, Inc., the Defendant/Cross Plaintiff, in this cause and files its Motion for New Trial pursuant to Rule 59, Federal Rules of Civil Procedure and as grounds for such motion would respectfully show unto this court as follows:

Introductory Comment

The Court entered on October 3, 1986, a Order of Remand in this case. The Order of Remand remanded the entire cause to the 167th District Court of Travis County, Texas. The October 3, 1986 Order was based on the Motion to Remand of Ann W. Richards, Treasurer of the State of Texas. The Court states in its Order that it considered the Motion to Remand and was of the opinion that it was meritorious and should be granted.

Defendant/Cross Plaintiff had not and has not received any Motion to Remand in the instant case either by certified mail, regular mail, or by any other manner of delivery. The attorneys

for Defendant/Cross Plaintiff have conferred with Messers. Benedict and Wiseman, attorneys for Ann W. Richards, Treasurer of the State of Texas who have acknowledged that their records do not reflect that a copy of the Motion to Remand was in any manner served upon counsel for the Defendant/Cross Plaintiff. On Friday, October 10, 1986 the counsel for the Defendant/Cross Plaintiff conferred with Mr. Wiseman in respect to the problems presented by the October 3, 1986 Order and indicated that the Defendant/Cross Plaintiff was going to file remedial pleadings in this case such as this Motion for New Trial and an Agreed Joint Motion for Reconsideration and Withdrawal of the October 3, 1986 Order as per his earlier discussions with Mr. Benedict. Mr. Wiseman and Mr. Benedict were called on October 13, 1986 to review with them the filing of this motion and were out of the city and unavailable for conference.

I.

The grounds for the new trial under Rule 59(a) are the same grounds which have applied in suits in equity in the Court of the United States. This Court was confronted with considering the Motion to Remand without having a responsive pleading from the Defendant/Cross Plaintiff. Defendant/Cross Plaintiff will show to the Court, parts and positions of laws that will defeat the Motion to Remand. Defendant/Cross Plaintiff was denied the right to respond to the Motion to Remand by the failure to deliver to it a copy of the Motion to Remand. Accordingly, the Defendant/Cross Plaintiff has not had an opportunity to present to this Court any defenses on the merits in respect to the Motion to Remand.

Conclusion

The failure of Plaintiff to serve upon the Defendant/Cross Plaintiff, as stated in the Certificate of Service, attached its Motion to Remand, denied the Defendant/Cross Plaintiff its rights to due process and rights to be heard in this Court.

The Motion for New Trial should be granted.

WHEREFORE, it is prayed that (1) the Order of October 3, 1986 in this cause be set aside, (2) Plaintiff's Motion for New Trial be heard before this Court, (3) the Court set a hearing for the earliest possible date on the Motion for New Trial, and (4) Plaintiff be granted such further relief in law and equity that is appropriate.

Respectfully submitted,

s/ CHARLES J. SULLIVAN
Charles J. Sullivan
Attorney-in-Charge

Of Counsel:

ANTHONY J. SADBERRY
WILLIAM F. HENRI
SULLIVAN, KING & SABOM, P.C.
5005 Woodway, Third Floor
Houston, Texas 77056
(713) 871-1185

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 1986 a true and correct copy of the Plaintiff's Motion for New Trial filed pursuant to Rule 59, Federal Rules of Civil Procedure was mailed via Certified Mail, Return Receipt Requested, to Mr. J. Patrick Wiseman, Assistant Attorney General of the State of Texas, Chief, State ~~and County~~ Division, and Mr. Jerry L. Benedict, Assistant Attorney General, Courts Building, P. O. Box 124548, Capitol Station, Austin, Texas 78711 on this the 13th day of October, 1986 and by Federal Express, Receipt Requested.

s/ CHARLES J. SULLIVAN
Charles J. Sullivan

APPENDIX F

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANN RICHARDS,
Treasurer of the
State of Texas
vs.
SANGER-HARRIS,
A Division of
Federated Department
Stores, Inc.

CIVIL
NO. A-86-CA-454

ORDER

Before the Court is Defendant Federated Department Stores, Inc.'s Motion for New Trial. The Court has duly considered the Motion and is of the opinion that it is not meritorious and should be Denied. The Court is of the opinion that it no longer has jurisdiction in this cause.

ACCORDINGLY, IT IS HEREBY ORDERED that the Defendant's Motion is hereby DENIED.

SIGNED and ENTERED this 22nd day of October, 1986.

s/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX G

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANN RICHARDS, Treasurer of the State of Texas vs. SANGER-HARRIS, A Division of Federated Department Stores, Inc.	CIVIL ACTION No. A-86-CA-454

JOINT MOTION FOR RELIEF FROM ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ann Richards, Treasurer of the State of Texas, Plaintiff and Federated Department Stores, Inc., the Defendant/Cross Plaintiff, in this cause and files this their Joint Motion for Relief From Order pursuant to Rule 60(b)(1), Federal Rules of Civil Procedure and as grounds for such motion would respectfully show unto this court as follows:

Introductory Comment

The Court entered on October 3, 1986, an Order of Remand in this case. The Order of Remand remanded the entire cause to the 167th District Court of Travis County, Texas. The October 3, 1986 Order was based on the Motion to Remand of Ann W. Richards, Treasurer of the State of Texas. The Motion to Remand, in its Certificate of Service, states that service was mailed to Attorney for Defendant. The Court states in its Order that it considered the Motion to Remand and was of the opinion that it was meritorious and should be granted. Defendant/Cross

Plaintiff had no notice of the Motion to Remand and did not appear before the Court.

The Defendant/Cross Plaintiff did not receive a copy of the Motion to Remand. Plaintiff's records do not indicate that Defendant/Cross Plaintiff had received the Motion to Remand in the instant case prior to October 3, 1986 either be certified mail, regular mail, personal delivery, or by any other manner of delivery. On Friday, October 10, 1986 the counsel for the Defendant/Cross Plaintiff conferred with Mr. Wiseman in respect to the problems presented by the October 3, 1986 Order and indicated that pursuant to his earlier discussions with Mr. Benedict the Defendant/Cross Plaintiff would file remedial pleadings in this case such as this Agreed Joint Motion for Relief From Order. Mr. Benedict was called on October 17, 1986 to review with him the filing of this motion and agreed to join in this Motion.

The grounds for relief from the Order under Rule 60(b)(1) are mistake or inadvertence. This Court was confronted with considering the Motion to Remand without having a responsive pleading from the Defendant/Cross Plaintiff. Defendant/Cross Plaintiff would have filed a responsive pleading if it had been given notice of the filing of the Motion to Remand. The mistake or inadvertence on the certificate of service led the Court into considering only issues raised by the Motion to Remand.

The parties state that Defendant/Cross Plaintiff, because of mistake or inadvertence, was denied the right to respond to the Motion to Remand by the failure to deliver to it a copy of the Motion to Remand. Accordingly, the Defendant/Cross Plaintiff has not had an opportunity to present to this Court its response, on the merits, in respect to the Motion to Remand.

Conclusion

The failure of Plaintiff to serve upon the Defendant/Cross Plaintiff, as stated in the Certificate of Service attached to its

Motion to Remand, denied the Defendant/Cross Plaintiff its rights to due process and rights to be heard in this Court.

The Joint Motion for Relief From Order should be granted.

WHEREFORE, it is prayed that (i) the Court set a hearing for the earliest possible date on the Joint Motion for Relief From Order, and (2) this Joint Motion for Relief From Order be heard before this Court, (3) the Order of October 3, 1986 in this cause be reconsidered, set aside, and withdrawn, and (4) such other further relief be granted in law and equity that is appropriate.

Respectfully submitted,

s/ CHARLES J. SULLIVAN
Charles J. Sullivan
Attorney-in-Charge
for Sanger-Harris

Of Counsel:

ANTHONY J. SADBERRY
WILLIAM F. HENRI
SULLIVAN, KING & SABOM, P.C.
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(713) 8[illegible]-1185

s/ JERRY L. BENEDICT
Jerry L. Benedict
Assistant Attorney General
Attorney General's Office
Attorney in Charge
for Ann Richards, Treasurer
of the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 1986 a true and correct copy of the Plaintiff's Motion for Relief From Order filed pursuant to Rule 60, Federal Rules of Civil Procedure was mailed via Certified Mail, Return Receipt Requested, to Mr. J. Patrick Wiseman, Assistant Attorney General of the State of Texas, Chief, State and County Division, and Mr. Jerry L. Benedict, Assistant Attorney General, Courts Building, P. O. Box 124548, Capitol Station, Austin, Texas 78711 on this the 17th day of October, 1986.

s/ CHARLES J. SULLIVAN
Charles J. Sullivan

APPENDIX H

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

ANN RICHARDS, Treasurer of the State of Texas vs. SANGER-HARRIS, A Division of Federated Department Stores, Inc.	CIVIL NO. A-86-CA-454

ORDER

Before the Court is the Joint Motion for Relief from Order. The Court has considered the Motion and is of the opinion that the motion is not meritorious and should be DENIED. This cause was remanded on October 3, 1986. In the order of remand the Court stated that remand was based "upon the ground that said cause was removed improperly and without jurisdiction." Consequently, the Court is of the opinion that it has no jurisdiction to entertain this motion.

ACCORDINGLY, IT IS HEREBY ORDERED that the Joint Motion for Relief from Order is hereby DENIED.

SIGNED and ENTERED this 8th day of December, 1986.

s/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX I

U.S. CONST., art. III § 1 and 2

Article III. The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

U.S. CONST., amend. V.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION: DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall nay person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1254(1):

SECTION 1254. COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. Section 1291 (Supp. 1983):

SECTION 1291. FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United Stated Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.

28 U.S.C. Section 1447(a), (b), (d), (e):

SECTION 1446. PROCEDURE FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petiton containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after

receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

* * *

(d) Each petiton for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

28 U.S.C. Section 1447(c), (d):

SECTION 1447. PROCEDURE AFTER REMOVAL GENERALLY.

* * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from

which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

§ 2201

28 U.S.C. Section 2201:

SECTION 2201. CREATION OF REMEDY

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

Sup. Ct. R. 20.4

RULE 20. REVIEW ON CERTIORARI-TIME FOR PETITIONING

* * *

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

* * *

FED. R. CIV. P.1:

RULE 1. SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

FED. R. CIV. P. 5

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by

the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

* * *

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order the depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

FED. R. CIV. P. 7:

RULE 7. PLEADINGS ALLOWED, FORM OF MOTIONS

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party

complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

* * *

FED. R. CIV. P. 59(a)(d):

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds: A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend

findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

* * *

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

* * *

FED. R. CIV. P. 60(b)(1), 60(b)(3):

RULE 60. RELIEF FROM JUDGMENT OR ORDER

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party, . . or (6) any other reason justifying relief from the operation of the judgment. . . .

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Supreme Court, U.S.
FILED
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NO. 87-____

IN THE SUPREME COURT OF THE
UNITED STATES OCTOBER TERM, 1986

SANGER HARRIS, A DIVISION OF FEDERATED
DEPARTMENT STORES, INC.,
PETITIONER

V.

ANN RICHARDS,
TREASURER OF THE STATE OF TEXAS,
RESPONDENT

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... iii

REASONS FOR DENYING THE WRIT..... 3

I. NO NEW QUESTIONS PRESENTED..... 3

II. NO DISCRETIONARY REVIEW APPROPRIATE 4

CONCLUSION..... 6

CERTIFICATE OF SERVICE..... 7

TABLE OF AUTHORITIES

CASES	PAGE
Gravitt v. Southwestern Bell, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed. 1 (1977).....	3
In re Pennsylvania Co., 137 U.S. 451, 11 S.Ct., 141, 34 L.Ed.2d (1976).....	3
Matthew v. Eldridge, 42A U.S. 319, 96 S.Ct., 893, 47 L.Ed.2d (1976).....	5
Thermtron Products, Inc. v. Hernansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976).....	3, 4
Volvo of America Corporation v. Schwarzer, 429 U.S. 1331, 97 S.Ct. 284, 50 L.Ed.2d 273 (1976).....	3
STATUTES	
28 U.S.C. Section 1447(c).....	4
28 U.S.C. Section 1447(d).....	3, 4
Tex. Prop. Code, Secs. 72.001 *et seq* (Vernons, 1987).....	1

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Ann Richards, Treasurer of the State of Texas, Respondent, by and through her attorney, the Attorney General of Texas, and files this Brief in Opposition.

STATEMENT OF THE CASE

On July 15, 1986, Respondent filed suit in the Texas State Court seeking to enforce her right to audit Petitioner's books and records to assure compliance with the Texas Unclaimed Property Laws, Tex. Prop. Code Ann., Secs. 72.001 *et seq* (Vernon's Supp. 1987). Respondent's state court suit was limited to the issue of the state's right to audit, and raised no federal claims. Petitioner

judicially admits that it has failed and refused to allow such an examination of records.

Four days later, on July 19, 1986, Petitioner made its first attempt to move this simple and straightforward state law matter to federal court when it filed suit against the Treasurer and Texas Attorney General Jim Mattox in the U.S. District Court, Southern District of Texas, Houston Division. This massive suit sought to enjoin the defendants from enforcing the provisions of the Unclaimed Property Law against Federated Department Stores. The Houston District Court dismissed the action, relying on the abstention doctrine (as well as other grounds).

On August 21, 1986, Petitioner again tried to move this controversy to federal court by filing a removal of the state court action to the U.S. District Court for the Western District of Texas, Austin Division. In October, 1986, the Austin District Court remanded this course back to the state court "upon the ground that said cause was removed improperly and without jurisdiction."

In December, 1986, Petitioner appealed District Court's remand order to the Fifth Circuit Court of Appeals. In a *per curiam* opinion dated March 11, 1987, the Fifth Circuit affirmed the District Court's remand and held that the remand order was not subject to challenge in the Court of Appeals. Then, on April 30, 1987, the Fifth Circuit denied Petitioners' Suggestion for Rehearing En Banc, marking the *fourth* time that a Federal Court told Petitioner that this matter should properly be decided in state court.

On June 8, 1987, Respondent was served with Petitioner's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. NO NEW QUESTION PRESENTED

Beginning in 1980 with the case of *In re Pennsylvania Co.*, 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890) until the 1977 case of *Gravitt v. Southwestern Bell*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed. 1 (1977), the Supreme Court has consistently held that where a district court remands an action to state court on statutory grounds, such as in the instant case, that remand order is unreviewable by appeal, mandamus, or otherwise.

In the intervening years, *Thermtron Products Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) clarified that where a district court has remanded a case on the basis that it was removed improperly and without jurisdiction, an appellate court may not look behind that order to determine its correctness.

Petitioner argues that *Thermtron, supra* does not apply here because "28 U.S.C. 1447(d) and the decision in *Thermtron* are extreme statements of legislative and judicial policy...that are subject to and circumscribed by the procedural due process and hearing guaranty of the Fifth Amendment to the Constitution of the United States." [Petition for a Writ of Certiorari, at pg. 12]. Petitioner attempts to bootstrap exceptions where none exist. The case cited above anticipate no such exceptions. In fact, the Supreme Court has twice stated that even erroneous remand decisions are unreviewable. *Thermtron, supra.* and *Volvo of America Corporation v. Schwarzer*, 429 U.S. 1331, 97 S.Ct. 284, 50 L.Ed.2d 273 (1976).

Volvo involved the district court's remand of a state law antitrust action on the grounds that the

district court lacked jurisdiction over the matter. The remand order cited specifically to 28 U.S.C. Section 1447(c). The Defendant sought appellate review, arguing that the district court incorrectly analyzed the jurisdictional question and, therefore, the order remanding the action was not authorized by 28 U.S.C. Sec. 1447(d). In holding that the remand order was not subject to review, the Supreme Court stressed that review of an order of remand where an action is "removed improvidently and without jurisdiction" is presumptively barred by Sec. 1447(d), whether or not the district court was correct in its analysis:

> "Applicant's position would mean that any allegedly erroneous application of Sec. 1447(c) would be reviewable by writ of mandamus, leaving the Sec. 1447(d) bar extent only in the case of allegedly proper applications of Sec. 1447(c), a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron*." 97 S.Ct. at 285.

Additionally, as the Fifth Circuit correctly wrote in this case: "The *Thermtron* Court does not say that we cannot review orders purporting to remand on this basis on certain grounds, or for certain faults; for constitutional infirmities, but not for statutory ones: it says we cannot review them *at all*. There it ends."

II. NO DISCRETIONARY REVIEW APPROPRIATE

As provided in Supreme Court Rule 17, review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons. In this case such reasons do not exist.

Petitioner submits that the Court should review this matter because the remand other allegedly jeopardized Petitioner's property interest by denying it access to the Federal Courts. Petitioner's property interest in this matter relates to the underlying unclaimed property, not to the choice of forum. Clearly, since *Matthew v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the status of procedural due process has been that the litigant is entitled to notice and a fair hearing. This court has consistently held that the state courts can provide adequate due process. Petitioner will have its guaranteed notice and hearing before the state district court.

Respondent would point out that Petitioner, in order to delay any hearing on the merits in state court, has attempted to bring this matter before three federal courts in the last year. Petitioner has been told in four separate opinions that this matter belongs in state court. Thus if delay is what Petitioner has sought, then Petitioner has already achieved its goal. Respondent believes it is now appropriate and necessary to obtain an order seeking an audit of Respondent's books and records. It is not time for Respondent to have her day in court.

Petitioner's interest in delaying an adjudication on the merits through procedural machinations is an abuse of the judicial system and is simply not important enough for the Supreme Court to overrule a century of precedent. Accordingly, Respondent respectfully urges that the petition for writ of certiorari be denied.

CONCLUSION

WHEREFORE, for all these reasons, Respondent pray that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

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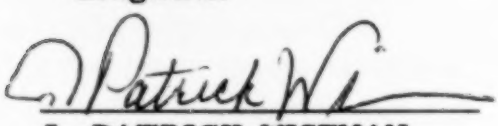

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Brief in Opposition was sent U.S. Mail, certified, return receipt requested to:

Charles J. Sullivan
Anthony J. Sadberry
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on this the 7th day of July, 1987.

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Special Assistant
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Supreme Court, U.S.
FILED
JUL 16 1987
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1937 (3)

SANGER-HARRIS, A Division of Federated Department Stores, Inc.,

Petitioner,

v.

ANN RICHARDS, Treasurer of the State of Texas,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Table of Contents	i
Table of Authorities	ii
Petitioner's Response to Respondent's Reasons for Denying the Writ	3

TABLE OF AUTHORITIES

PAGE

Cafeteria and Restaurant Workers Unions v. *McElroy*, 367 U.S. 886, 895 (1961) 5

Ex parte Pennsylvania Co., 137 U.S. 451 (1890) 3, 4, 6

Getty Oil Co. v. *Richards*, No. C-85-335, (S.D.Tex. Jan. 8, 1986) 6

Gravitt v. *Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) 3, 4, 6

Heniford v. *American Motor Sales Corp.*, 471 F.Supp. 328, 335 (D.S.C. 1979) 4, 5, 6

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) .. 5

McVeigh v. *United States*, 78 U.S. (11 Wall) 259, 267 (1870) 7

Marketing Showcase, Inc. v. *Alberto-Culver Co.*, 445 F.Supp. 755, 760 (S.D. N.Y. 1978) 4, 6

Matthews v. *Eldridge*, 424 U.S. 319 (1976) 5

Morrissey v. *Brewer*, 408 U.S. 471, 481 (1972) 5

Silverthorne Lumber Co. v. *United States*, 251 U.S. 385, 392 (1920) 7

Thermtron Products, Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976) 3, 4, 6

Volvo Corporation of America v. *Schwarzer*, 429 U.S. 1331 (1976) 3, 4, 6

Wong Sun v. *United States*, 371 U.S. 471, 484 (1963) . 7

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V. 4

STATUTES

TEX. REV. CIV. STAT. ANN. Article 3272a (Vernon 1961) 1

TEXAS PROP. CODE ANN., §§ 71-75 2

FED. R. CIV. P. 5(a) 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 87-~~86-1937~~.....

SANGER-HARRIS, A Division of Federated Department Stores, Inc.,

Petitioner,

v.

ANN RICHARDS, Treasurer of the State of Texas,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Sanger-Harris, a Division of Federated Department Stores, Inc., Petitioner, by and through its attorney, Charles J. Sullivan, and files this Response to the Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CLARIFICATION OF FACTUAL CONTENTIONS OF THE PARTIES

A. The Petitioner has offered to make available for audit books and records of the Petitioner for relevant time periods.

Texas enacted its statute pertaining to the escheat of personal property in 1961, i.e., TEX. REV. CIV. STAT. ANN. Article 3272a (Vernon 1961). The Petitioner timely filed the reports required under Texas' escheat laws, which reports were accepted

as filed or not examined by the State of Texas. In 1986 the Respondent, citing Sections 71-75 of the Texas Property Code, which became effective September 1, 1985, requested permission to have an unlimited audit of the Petitioner's books and records, i.e., books and records back to 1961. The Petitioner declined to make available for audit its books and records for periods prior to September 1, 1981,[1] which fact the Respondent acknowledged in Paragraph IV of her declaratory judgment action filed on July 15, 1986 in the district court of Travis County, Texas.[2]

B. Other.

On July 28, 1986 the United States District Court for the Southern District of Texas — Houston Division denied a temporary restraining order/preliminary injunction in *Federated Department Stores* v. *Ann Richards*, Cause No. H-86-2759 filed on July 19, 1986 and issued its confirmatory written order on August 7, 1986. The Court thereafter dismissed Cause No. H-86-2759 on March 25, 1987.

---

[1] The dormancy period under the Texas Escheat Act was seven years until September 1, 1985 at which time the dormancy period became three years. The decisions in *Southern Pacific Transport Co.* v. *Texas*, 380 S.W.2d 123 (Tex.Civ.App.-Houston 1964, writ ref'd) and *Shell Oil Co.* v. *Texas*, 442 S.W.2d 457 (Tex.Civ.App.-Houston [14th Dist.] 1969, writ ref'd. n.r.e.) established the rule of law that claims against a debtor that were barred by a statute of limitations shorter than the seven year dormancy period of the Texas Escheat Act were not subject to escheat to Texas for the reason that Texas' escheat claim against the debtor was unenforceable just as the original creditor's claim was unenforceable.

[2] The filing date reference to footnote No. 2 in the Petition for Certiorari in respect to *Richards* v. *Sanger-Harris*, No. 400,639, 126th District Court of Texas was incorrectly stated as October 3, 1986. The correct filing date is July 15, 1986.

PETITIONER'S RESPONSE TO RESPONDENT'S REASONS FOR DENYING WRIT

1. The Respondent seeks to ignore the due process guaranty of the Fifth Amendment.

The Respondent in her Brief in Opposition ignores:

1) the fact that it was the Respondent's actions that caused the absence of notice to the Petitioner and the denial to the Petitioner of an opportunity to be heard in respect to the remand motion; and

2) the due process consequences of the absence of notice to and opportunity for the Petitioner to be heard in respect to the remand motion.

The Respondent's election to avoid addressing the due process issue in her Brief in Opposition, is not dispositive of the due process issue. It constitutes an implied confession and avoidance, i.e., an admission that there is a problem and an attempt to avoid it under a "no new question" and a "no discretionary review" standard.

2. The issuance of a remand order upon the motion of a party without notice/hearing to the opposing party is a remand question not previously addressed by the Court.

The Respondent urges this Court to deny the petition for writ of certiorari on the grounds that no new question has been presented to the Court for resolution. The due process issue of absence of notice and the granting of a hearing to the opposing party in a removal/remand situation was not presented to or decided by this Court in *Ex parte Pennsylvania Co.*, 137 U.S. 451 (1890); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976); *Volvo Corporation of America* v. *Schwarzer*, 429 U.S. 1331 (1976); or *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977).

A non-resident defendant's statutory right to remove a case from state court is a substantial right and privilege to secure a presumably unprejudiced forum. *Heniford* v. *American Motor Sales Corp.*, 471 F.Supp. 328, 335 (D.S.C.-1979); *Marketing Showcase Inc.* v. *Alberto-Culver Co.*, 445 F.Supp. 755, 760 (S.D. N.Y. 1978).

The Respondent has not challenged the Petitioner's contention that the remand order was issued at the Respondent's request without the Petitioner having notice of the Respondent's remand motion or being extended an opportunity to be heard in respect to such motion. The Respondent has neither assumed, nor disclaimed responsibility for the unfair consequences of her failure to comply with the service requirement of FED.R.CIV.P. 5(a), but instead has adopted the position that the issuance of the remand order is a *fait accompli* which falls within the ambit of this Court's prior decisions in the *Pennsylvania*, *Thermtron*, *Volvo* and *Gravitt* cases.

The Respondent's "new question" argument does not address the question of the overriding effect of the Fifth Amendment's guaranty of due process. Since its adoption on December 15, 1791, the Fifth Amendment to the United States Constitution with its guaranty of due process has been a limitation applicable to every statute and a legal beacon relied upon by this Court in delineating permissible and impermissible conduct. The Respondent does not suggest that the due process requirement of notice and hearing in removal/remand cases is new. Instead the Respondent stresses the teachings of remand cases which did not involve due process notice and hearing questions.

The due process issue in this case is the fact that the Petitioner was not extended due process *at all*. The issue simply stated is "Was the Petitioner denied due process when the trial court terminated the removal of the case upon the motion of the Respondent who failed to give the Petitioner notice of the filing

of the remand motion and did not seek a hearing at which the Petitioner could be heard?"

The due process concerns in this case do not revolve around a "technical conception with a fixed context unrelated to time, place and circumstance" or the fashioning of flexible "procedural protections as the particular situation demands." *Joint Anti-Fascist Refuge Committee* v. *McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring); *Cafeteria and Restaurant Workers Unions* v. *McElroy*, 367 U.S. 886, 895 (1961); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

At some future date if the Fifth Circuit's decision remains unchanged, the courts may be confronted with questions as to whether there had been deception and an intentional failure to serve notice on the opposing party pursuant to FED.R.CIV.P. 5(a) on the premise that remand orders were not reviewable.

By her citation of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), the Respondent indicates her understanding that the Petitioner was entitled to notice and a fair hearing. It is not clear, however, how the Respondent can in a "mistake or inadvertence" situation[3], adopt a *fait accompli* attitude and cite as justification for her position rules developed in cases that did not involve a due process notice/hearing issue.

The question before the Court is not whether the failure to give notice and extend an opportunity for hearing is the result of intentional, inadvertent or mistaken conduct, but instead is whether a remand order issued at the behest of a party is fatally defective when notice to and an opportunity for the opposing party to be heard is absent. The latter question is new and has not been encompassed in this Court's prior decisions.

---

[3] The Petitioner has accepted and acted upon the proposition that the false/incorrect certification as to service of the remand motion upon the Petitioner was the result of "mistake or inadvertence" and not the result of crafty trial tactics. *Heniford* at 338.

3. Discretionary review is not only appropriate but is essential to the on-going functioning of our legal processes.

The Respondent suggests that there is no special or important reason why this Court should exercise its discretion and grant its writ of certiorari.

The proper application of the due process guaranty in and of itself is a special responsibility. The guaranty is neither tentative nor discretionary. The guaranty is part of the fundamental fabric of our legal system.

The Fifth Circuit has held in this case that a constitutionally deficient remand order is not reviewable pursuant to the prohibitions outlined in the *Thermtron* case. It is important in light of the Fifth Circuit's decision that this Court exercise its supervisory jurisdiction to make it clear that the decisions in the *Pennsylvania, Thermtron, Volvo* and *Gravitt* cases did not exclude due process requirements from removal/remand cases or create a due process exception for removal/remand cases.

The due process issue in this case is not one involving the adequacy of due process at the state court level. The issue is whether the complete absence of notice to the Petitioner with the resultant denial to the Petitioner of the right to be heard in respect to the remand motion resulted in the denial to the Petitioner of a substantial statutory right and privilege, that is, the right, as a non-resident defendant, of having its case heard in a presumably impartial, unprejudiced tribunal. *Heniford* at 335; *Marketing Showcase* at 760.

Just as the non-resident Plaintiffs in the *Getty* case concluded that trial of their challenge to Texas' escheat laws would be best heard in federal court, the Petitioner, a non-resident defendant, determined that the resolution of its dispute with the Respondent about the Respondent's audit rights would be best accomplished in federal court. After the Petitioner elected to avail itself of its statutory right of removal, the Respondent, through

mistake or inadvertence failed to give notice to the Petitioner of the filing of the remand motion which placed in operation the judicial processes which resulted in the remanding of the case without the non-resident Petitioner being heard in respect to the removal/remand situation.

The failure by the Respondent to give the Petitioner notice of the filing of the remand motion accompanied by the trial court's action on such motion without giving the Petitioner an opportunity to be heard violated "the first principle of the social compact and of the right administration of justice." *McVeigh* v. *United States*, 78 U.S. (11 Wall) 259, 267 (1870).

The double lament of the Respondent that there has been delay in the resolution of the issue raised by the Respondent's declaratory judgment action and that "it is not time for the Respondent to have her day in court" ignores the fact that the problem arose because of the Respondent's false/incorrect certification that her remand motion had been served upon the Petitioner. The Respondent's *fait accompli* reliance upon the issuance of a remand order is not justification for excluding due process considerations from or for carving out a due process exception in a removal/remand case. Just as evidence obtained in a constitutionally deficient manner must be excluded to prevent the use of the "fruits of the agents' unlawful action", the remand order in this case obtained pursuant to a constitutionally deficient process should be reviewable and should be reversed. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963).

CONCLUSION

There can be no due process for a litigant in the absence of notice and an opportunity for a meaningful hearing.

This case should not be allowed to stand in its present form. If the Fifth Circuit's decision is allowed to stand without change or modification, the foundation will have been laid for future due

process attacks to the effect that since there is a known removal/remand exception to the due process guaranty, there must be other exceptions which are simply awaiting identification.

In situations involving improper practices there will be the unsavory problem of proving that the due process guaranty may have been compromised by fraud, deception, etc.

WHEREFORE, it is prayed that this Court exercise its supervisory authority, reverse the decisions of the Fifth Circuit and the trial court and require the trial court to conduct a hearing in respect to the remand motion.

Dated July 16, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the Petitioner's Reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been made on opposing counsel by mailing a copy, certified mail, return receipt requested, to Mr. Jerry L. Benedict and to Mr. Patrick J. Wiseman, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548 this 16th day of July, 1987.

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